No. 11,152

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE COLUMBIAN NATIONAL LIFE INSURANCE COMPANY (a corporation),
Appellant,

vs.

A. QUANDT & SONS (a co-partnership),
Appellee.

APPELLANT'S PETITION FOR A REHEARING.

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To the Honorable Francis A. Garrecht, Presiding Judge, and to the Honorable Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The appellant respectfully petitions the Court to grant a rehearing in this matter on the following grounds:

1. In holding the trial Court's finding to be supported by a conflict in the evidence this Court:

(a) Misconstrued the testimony of Doctor Bostick and inadvertently misstated his testimony in the opinion, and

(b) Erroneously held the testimony of Doctor Bostick that the assured had a cancer in December of 1943 to be contradicted by the testimony of other witnesses who did not even express an opinion when testifying as to whether they then believed the assured had a cancer at the time in question.

2. The Court's holding for all practical purposes vitiates the sound health clause which is admittedly valid when agreed to by the parties to an insurance contract.

In support of this application for a rehearing the appellant calls the following matters to the Court's attention:

The question is not whether there was an actionable misrepresentation as to sound health, but whether the condition precedent of sound health at the date of the delivery of the policy was met as a matter of substantive fact; the burden being upon the appellee to establish such fact.* This was the appellant's contention and the Court has not cited any cases to the contrary, nor expressed any contrary doctrine. Its decision is premised entirely on the assertion that there was a conflict on the evidence on this question, justifying a finding in the appellee's favor.

The appellant not only contends that there was no such conflict, but it respectfully contends that the

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*_Person v. Aetna Life Ins. Co._ (CCA 8), 32 F. (2d) 459; _Scharlach v. Pacific Mutual Life Ins. Co._ (CCA 5), 16 F. (2d) 245, and numerous other cases cited in footnote to page 8 of appellant's original brief.

Court in so holding inadvertently misstated the evidence.

The insured died within four months of the date of the delivery of the policy. He died from cancer. The statement of the matters which the Court held justified a finding that he did not have cancer four months before his death was in the next to last paragraph of the opinion. These matters were as follows:

1. "The doctor who examined the insured for the insurance company testified that * * * so far as he could determine the insured was in sound health at the time of the examination for insurance."

This examination took place on November 13, 1943. Admittedly the insured had a cancer* at some time thereafter, even if, as appellee contends, he did not have it then. The question was, when did it develop. The testimony of this witness did not even purport to suggest that the insured did not have cancer by December 4, 1943. Furthermore, the witness did not testify that in the light of the autopsy and subsequent admitted developments his present opinion was that the insured did not have cancer on November 13.

He merely stated that he did not discover the cancer at that time. It is well known that cancer is not discoverable from the moment it exists. It is, of course, a progressive disease. Where admittedly the insured had a cancer not long after the delivery of the policy, the fact that at some earlier date a doctor had not been able to discover it is not affirmative evidence to

*Six inches in size by April 2, 1944. (R. 78.)

justify a finding against positive testimony based on an autopsy that the cancer in fact existed.

The Court will not sustain a finding on a mere scintilla of evidence, if it can be said that this testimony as to November 13 constituted as much as a scintilla. The case is almost exactly like *Scharlach v. Pacific Mutual Life Ins. Co.* (CCA 5), 16 F. (2d) 245, cited in appellant's original brief, page 8. In that case the policy was delivered May 12, 1923. Physicians of his own who had examined him in March and April testified that he was anaemic, but that they found no evidence of cancer. He died July 26 of cancer. Physicians called by the Company testified from the autopsy that the cancer existed at the time of the delivery of the policy.

The beneficiary, as in this case, called the physician who had examined the insured on behalf of the Company for his insurance. He testified that so far as he had determined at the time, the insured was in sound health, and not suffering from any disease. There was also testimony, as in the case at bar, later to be referred to, of lay witnesses, that the insured appeared to be in good health when the policy was delivered. In holding that a verdict was properly directed for the company the Court said, at pages 247-8:

> "To say the least, it is questionable whether there was the slightest inconsistency between the evidence to the effect that the deceased was not in good health when the policies were delivered and the evidence relied on by the plaintiff in error. * * * A cancer disclosed by an operation may not be evidence sufficient to support a find-

ing as to how long it had existed, and at the same time be conclusive proof that it had been in existence several months. There was no material conflict between the other testimony relied on by the plaintiff in error and that to the effect that deceased was not in good health on May 12th, when the policies were delivered. * * *

"Where the disease is one the existence of which at a given stage of it is not discoverable, even by a skilled physician, except by ascertaining existing symptoms and making an examination of the blood of the person in question, a finding by a physician, based on such an examination, that that person has such disease, *cannot well be said to be put in issue or impeached by a finding of the absence of disease by another physician, who made no such examination, and from whom the symptoms suggesting such examination were concealed,* or by testimony, based only on observation of such person's outward appearance, that he then seemed to be in good health. Obviously such evidence lacks probative value, where the question is whether a person has or is free from a disease or ailment which is not discoverable by merely observing the outward appearance of that person. * * *

"* * * But, assuming that the evidence relied on by the plaintiff in error, if standing by itself, was sufficient to support a finding that the deceased was in good health when the policies were delivered, it was not such evidence as reasonably could be given the effect of rebutting or contradicting the evidence which showed that the deceased then had a serious internal disease, the existence of which was not disclosed by his outward appearance." (Italics supplied.)

In connection with the last quoted sentence, the Court will note particularly the testimony by the instant witness (R. 54) that his examination was not conclusive and that the value of his opinion was dependent on other factors.

> "Q. At the time you made this examination Theodore W. Quandt, the deceased, was in sound health?
>
> A. As far as I could make out he was, yes.
>
> Q. You are a physician, and you would have discovered it, wouldn't you?
>
> A. You have to go a lot on history, because from the questions you ask he could have it without knowing it, and he could have it without knowing it if he did not give you symptoms that would lead you to think that he had."

Mr. Quandt did not disclose the indigestion attacks to this witness, Dr. Cox (R. 22)* and the clear inference from his testimony was that the witness may have been in error on his diagnosis.

And again, in connection with the italicized sentence from the above opinion, the same witness testified, at page 52:

> "Q. Did you make any examination when you made your examination for life insurance to ascertain if the patient is suffering from pain?
>
> A. Well, as to the abdomen, we feel over the abdomen. The history, a good deal of it has to be what he tells you.
>
> Q. Did you make any examination of the blood?

*Which the evidence showed had existed for several months (R. 70), a fact regarded as important by appellant's doctor. (See point 3, infra.)

A. No, we don't do that.

Q. What would be the usual examination that might be made to discover whether a patient was suffering from cancer?

A. Well, one of the first things we would have would be an X-ray, or make a microscopic examination, but you do not go through that unless you have symptoms."

Thus it appears that the insured did not report his symptoms, and the doctor *did not make* the examination which he stated was necessary to rule out the question of cancer. Of what substatial value, then, is his testimony? The case is on all fours with the *Scharlach* decision. The Court did not, however, discuss either that case, or any other case cited by the appellant, in its opinion.

2. "Another doctor who had examined the insured about the same time testified the insured was in perfect health * * * in sound health."

This was Dr. Mitchell. He examined the insured on November 18, 1943. What was said about the previous witness applies equally to him. Dr. Mitchell not only did not state that his *present* opinion was that the insured did not, in the light of later events, have cancer at the time of his examination—much less 2½ weeks later—but he was very careful to qualify his opinion. He said (R. 61), "Well, *as far as I was aware at that time* Mr. Quandt was in perfect health." (Italics supplied.) This was not, as the Court stated in its decision testimony "that the insured *was* in perfect health" on November 18. The witness was not asked that question. It was only testimony that

so far as he discovered *at that time* the insured was in such health—two very different things. The appellee put both of these witnesses on, and did not ask either of them for their present opinion, but only for their past opinion. That is not the way to satisfy the burden of proof, or to contradict positive autopsy findings, as the Court held in the *Scharlach* case.

3. "The doctor who performed the autopsy, as a witness for the appellant, on direct examination declared that the cancer was at least a year old at the time of the insured's death, *but* on cross-examination *qualified* the statement thus, '* * * I would prefer to say that he had probably had it for six months or even longer, but that can't be said positively.' " (Italics supplied.)

With all proper respect, the Court has misunderstood the witness' testimony. The quoted statement appears at page 85 of the transcript. For the two previous pages, and right to and including the question to which this is an answer, *and immediately beyond,* the discussion relates not to when the insured developed the *cancer,* but when the *symptom* of nausea commenced, or should have commenced. It is that symptom to which the quoted answer relates, and not to the commencement of the cancer itself. The Court's construction and application of this individual sentence is both inaccurate and unfair. It is particularly so in the light of the witness' testimony two pages later (R. 87) removing any possible ambiguity.

> "Q. Doctor, is there any question in your mind, basing your answer on your experience and learning, that this cancer existed in this man

in November, 1943, approximately five months prior to his death?

A. Oh, absolutely no doubt. There is not the slightest possibility that there was no cancer there. There is, positively."

A conflict in the testimony should not be said to exist by misconstruing testimony. The appellant is sure that the Court did not do this intentionally, but since this was the *only* witness who testified as to a final opinion on the question of when the cancer commenced, as distinguished from an initial preliminary diagnosis, it was of course error by this Court of the most prejudicial character.

4. "There was other conflicting testimony."

The only other testimony which the appellee claimed in its brief to be conflicting was the testimony of the agent that the insured appeared to be in sound health. This was not, coming from a layman, even a scintilla of evidence that he did not have cancer.

Greenbaum v. Columbian National Life Ins. Co., 62 F. (2d) 56.

The appellant respectfully submits that not only was there no conflict in the evidence, but the Court's opinion saying there was one overstated the testimony of one witness and misstated the testimony of another on the very matter at issue.

Finally, the appellant respectfully requests reconsideration of the general question and the effect of the present decision of this Court. The purpose of the sound health clause, a clause uniformly approved by the Courts and one which the Company has a right to

expect to be enforced, is that the insurer will not be liable, in return for a premium of $382.05, to pay less than four months from the date of the delivery of the policy the total amount of $15,000 for a loss caused by disease if it had already commenced when the policy was delivered. Obviously in no case does the insured *appear* to have the disease when the insured is examined and the policy approved or the policy would not have been delivered in the first place. If the Court is going to support a finding against the Company in the face of positive testimony based upon demonstrable physical facts disclosed by the autopsy, simply on evidence that the insured appeared to a physician or physicians to be in good health the week that he was examined for the policy, then the entire purpose of the sound health clause is destroyed. Of course the insured appeared to be in sound health then or, as above stated, the policy would not have been approved. The agreement in the sound health clause was not whether he *appeared* to be in sound health to the insured's physician (or to some other physician for that matter, the question being the same), but whether he was *in fact* in sound health.

As previously stated, neither of the appellee's witnesses testified that in the light of subsequent evidence he was *in fact in sound health at the time of the delivery of the policy,* but merely that he had appeared so to them some two or three weeks before. If the sound health agreement is to mean anything at all, the decision of the court that the burden of proof as to this condition precedent has been satisfied by such evidence reduces its meaning to an imperceptible min-

imum. It is allowing the appellee to meet the burden of proof merely by a showing of what was known to the Company to have existed anyway, and this in the face of a positive showing by the autopsy that the insured had a six inch cancer four months later. The appellant's expert, the official deputy surgeon for the coroner of the City and County of San Francisco, who had performed over 3000 autopsies, testified that this cancer had reached a stage of development showing it had been in existence for twelve months. *Not a single expert was called by the appellee to give an opinion contradicting that positive assertion.* The appellant respectfully submits that this Court erred in stating in its opinion that this witness qualified or contradicted himself, and erred in disregarding well-settled principles in holding that the fact that some weeks before the delivery of the policy physicians failed to find the cancer created a substantial contradictory issue of fact satisfying the burden of proof that no cancer existed when the policy was delivered.

The record is absolutely bare of any testimony that the insured was in sound health on December 4, 1943. This void is not to be filled by any "presumption" that he continued to be in the same condition he was in on November 13 or 18, in the face of the undisputed testimony that by April 2 a six inch cancer existed. *Even* if he *had no* cancer in November, he had one before April. The burden was on the appellee to show that he did not have it in December. For that proposition there was no evidence whatever.

The appellant respectfully requests the reconsideration of the present opinion and a reversal of the decision below.

Dated, San Francisco,
May 20, 1946.

KEESLING & KEIL,
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Attorneys for Appellant and Petitioner.

CERTIFICATE OF COUNSEL FOR APPELLANT.

It is hereby certified that this petition for a rehearing is made in good faith; that in our judgment it is well founded and that it is not interposed for delay.

Dated, San Francisco,
May 20, 1946.

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